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As was to be expected, the outbreak of the war has deprived the REVIEW BOARD of many of its most valued members. A reorganization has, however, been effected, and the work will be carried on. It has been thought best to have the REVIEW, in so far as possible, continue solely a student publication, but, when, from time to time, necessity demands, we shall not hesitate to avail ourselves of the kind offer of the Faculty to contribute notes, subscribing to such notes, of course, the initials of their author.

# NOTES.

THEFT OF INCOMPLETE NEGOTIABLE INSTRUMENT AND NEGOTIATION TO A HOLDER IN DUE COURSE.—The basis for the claim of a holder in due course of a bill or note against the maker, acceptor or drawer, is not that his transferor had a claim against the maker, *etc.*, which has been transferred. In no case where the holder's claim against the maker

depends upon his being a holder *in due course* does his transferor have such a claim, though the truth is sometimes obscured by the statement that the transferor had a claim against the maker, subject, however, to the maker's defense rendering the claim unenforcible, until "its" transfer to a holder in due course. The execution and delivery of a writing in the form of a bill or note induced by the deceit of the payee as to a collateral fact do not result in the imposition upon the signer of the obligation of drawer or maker, any more than a forgery of the writing would result in the imposition of an obligation upon the person whose signature was forged. In other words, a so-called personal defense is as inconsistent with the existence of a legal claim of payee against maker as a so-called real defense.

The motive for the imposition of the duty upon the maker to the holder in due course at the moment of the transfer of the writing to the latter is roughly the desire of a commercial state to stimulate commerce by making more liquid and available as cash, instruments of credit usually accepted in commercial transactions. It is an analogous motive to that effectuated in the rule of law that vests in the innocent purchaser for value, in goods the property represented by a stolen bill of lading,[1] in stolen goods bought in market *overt*,[2] in land bought from a grantor whose prior deed has not been recorded.[3]

This motive is effectuated in law by realizing the expectation which is aroused in the holder in due course by the appearance of the paper in the possession of the wrongful transferor, that the maker will perform the promise on the face of the writing. However, the appearance is the same in the case of fraud and in the case of forgery instanced above. Obviously the realization ought not to be at the expense of one whose acts are not in some way causally connected with the appearance. Hence there are developed rules, dictated by considerations of causation and convenience, for determining the maker's responsibility for the appearance. The issue presented in a case involving the formulation or application of these rules is obscured either by stating it as a question of so-called real and personal defenses,[4] or by stating it in terms of estoppel by misrepresentation.[5] The former method erroneously suggests that the maker cannot be obligated to the holder in due course unless obligated to the payee; the latter, that the maker's obligation normally depends upon intention rather than legal responsibility for appearances created. The advantage of facing the real issue unobscured by misleading analyses is particularly clear in discussing the case of stolen writings either in the form of a bill or note, or in a form which would upon completion satisfy the formal requisites of a bill or note.

One in possession of a writing in the form of a bill or note transferable by delivery appears to be the obligee of the signer's alienable obligation. If the possessor acquired possession by theft the appearance to a prospective innocent purchaser is the same as in the case of a voluntary delivery with intention that the writing should take effect presently according to its terms. It is a case of "ostensible ownership". Whether the maker becomes obligated to a holder in

[1]Uniform Bills of Lading Act, §§ 31, 38.

[2]Williston, Sales, § 347.

[3]N. Y. Consol. Laws, c. 50, § 291, and similar statutes.

[4]See 2 Ames, Cases on Bills and Notes, 811, 812.

[5]See Ewart, Estoppel, c. 24, 25; 2 Ames, *op. cit.*, 865.

due course purchasing from the thief depends upon whether the signer's completion and retention of the writing under the circumstances are regarded as sufficiently important in the chain of causation resulting in the appearance; and upon the balance of convenience between the permitting of men to write out, an appreciable interval before delivery, forms of bills and notes transferable by delivery, and the making of credits in the form of bills and notes as nearly available as cash as may be. Prior to the Bills of Exchange Act, 1882,[6] in England, and in most of the United States prior to their adoption of the Uniform Negotiable Instruments Law,[7] no rule determining the point had been adopted. In a few jurisdictions the maker was obligated;[8] in a few he was not.[9]

One in possession of a writing which would be in the form of a bill or note transferable by delivery were it completed by the filling in of one or more of the formal requisites[10] in blank spaces apparently left in order that the writing may be completed, does not appear to be the obligee of the maker. There is no "ostensible ownership". This is quite as true in the case of a voluntary delivery with intention that the writing shall be completed, as in the case of a theft. In the case of a voluntary delivery with intention that the writing shall be completed, does the possession of the incomplete writing create any appearance beyond one of authority in the possessor as agent to complete the writing in some one or few particular modes out of an infinite number of possible modes? The particular mode or modes of completion which are authorized, if any is authorized, do not appear. In other words there is an appearance of authority to fill up the blank in some unknown way, but no appearance of authority to fill up in any specified way. Since an agent's power to obligate his principal depends upon the principal's responsibility for the agent's appearance of authority to do the very act subjecting his principal to duty or liability, it is clear the possessor has, merely by virtue of his possession, no power to obligate the signer of the writing.[11] Since there is no appear-

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[6]Under § 21 (*2b*) the maker would be obligated.

[7]Under § 16, following the British statute, the maker would be obligated. Massachusetts Nat'l. Bank *v.* Snow (1905) 187 Mass. 159, 72 N. E. 959; Buzzell *v.* Tobin (1909) 201 Mass. 1, 86 N. E. 923; Greeser *v.* Sugarman (1902) 37 Misc. 799, 76 N. Y. Supp. 922; Poess *v.* Twelfth Ward Bank (1904) 43 Misc. 45, 86 N. Y. Supp. 857 (*semble*); Schaeffer *v.* Marsh (1915) 90 Misc. 307, 153 N. Y. Supp. 96; Angus *v.* Downs (1915) 85 Wash. 75, 147 Pac. 630, L. R. A. 1915 E, 351.

[8]Shipley *v.* Carroll (1867) 45 Ill. 285; Clark *v.* Johnson (1870) 54 Ill. 296; Kinyon *v.* Wohlford (1871) 17 Minn. 239; see note L. R. A. 1915 E, 352 *et seq.*

[9]Salley *v.* Terrill (1901) 95 Me. 553, 50 Atl. 896; Burson *v.* Huntington (1870) 21 Mich. 415; see note L. R. A. 1915 E, 352 *et seq.*

[10]Cases where the writing satisfies the formal requisites but contains blank spaces for other particulars should be distinguished. Norton, Bills and Notes (4th ed.) 348*n*.

[11]In such a case if the possessor does appear to have an authority to fill up the blank in a particular way it will be because an appearance of authority is created by the statements or conduct of the signer or the possessor other than the delivery to the possessor or the having of possession by the latter. Whether in such case the possessor has a power as agent to subject the signer to an obligation depends upon the respon-

ance of authority it is not necessary to consider the signer's responsibility. Thus in England before the Bills of Exchange Act, 1882, an innocent purchaser for value of an incomplete writing acquired a power to obligate the maker no greater than the power of his transferor.[12] In the United States, however, most jurisdictions refused to make the power of the possessor of an incomplete writing to subject the signer to an obligation to a holder in due course depend on principles of agency, but chose to regard the incomplete writing as an "instrument" which, though not in the form of a bill or note, was sufficiently like such a writing to be dealt with analogously. Just as the voluntary delivery of a writing in the form of a bill or note with intention that it should take effect as such created a power in the possessor to subject the maker to an obligation to a holder in due course, so the voluntary delivery of an incomplete "instrument" with intention that it should be complete created in the possessor an unlimited and alienable power to fill in the blanks and transform the "instrument" into the bill or note of the signer.[13]

If an incomplete writing voluntarily and intentionally delivered is transformed in an unauthorized mode by the possessor into the form of a bill or note before its presentation to the prospective purchaser, an appearance that the possessor is the obligee of the maker is created. It is a case of "ostensible ownership". The question then becomes one of responsibility. In most of the jurisdictions of the United States, since the facts upon which to base responsibility are the same as in the case where the writing has not been completed upon its presentation to the prospective purchaser, the rule is what argument by analogy would lead one to expect: the possessor is vested with a power to obligate the signer to a holder in due course.[14] In England, also, upon the completion of the writing a power vests in the possessor

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sibility of the signer for the appearance. If he is responsible under the law applicable to principal and agent, he is obligated. Chalmers, Bills of Exchange (7th ed.) 56.

[12]Awde *v.* Dickson (1851) 6 Exch. 869; Hatch *v.* Searles (1854) 2 Sm. & G. 147; Hogarth *v.* Latham (1878) 3 Q. B. D. 643. The Bills of Exchange Act, 1882, § 20 (2), codifies the doctrine of these cases, providing that the maker is not obligated unless the writing is completed "strictly in accordance with the authority given".

[13]Huntington *v.* Branch Bank (1841) 3 Ala. 186; Mitchell *v.* Culver (N. Y. 1827) 7 Cow. 336; Frank *v.* Lillienfeld (1880) 74 Va. 377; Loring, *J.*, in Boston Steel & Iron Co. *v.* Steuer (1903) 183 Mass. 140, 66 N. E. 646; 2 Ames, *op. cit.*, 868. The Uniform Negotiable Instruments Law, § 14, adopts the English rule and changes the law in jurisdictions which have adopted it. Boston Steel & Iron Co. *v.* Steuer, *supra*; Guerrant *v.* Guerrant (1902) 7 Va. Law Reg. 639; see Dumbrow *v.* Gelb (1911) 72 Misc. 400, 130 N. Y. Supp. 182; Hunter *v.* Allen (1908) 127 App. Div. 572, 111 N. Y. Supp. 820. However, under the Uniform Negotiable Instruments Law, § 14, as under the Bills of Exchange Act, 1882, § 20 (1), the burden of going forward with the evidence on the issue of authority is upon the signer of the incomplete writing. Madden *v.* Gaston (1910) 137 App. Div. 294, 121 N. Y. Supp. 951.

American decisions before the Uniform Negotiable Instruments Law did not, for obvious reasons, regard an autograph on a wholly blank paper as an incomplete "instrument". Caulkins *v.* Whistler (1870) 29 Iowa 495.

[14]Bank of Pittsburgh *v.* Neal (1859) 63 U. S. 96, 107; First Nat'l. Bank *v.* Compo-Board Mfg. Co. (1895) 61 Minn. 274, 63 N. W. 731; Uniform Negotiable Instruments Law, § 14.

to obligate the maker to a holder in due course. The voluntary and intentional delivery of the incomplete writing by maker to possessor is regarded as a fact sufficient to make the former responsible for the appearance created by the latter.[15]

Suppose, however, the possessor acquires the incomplete writing by theft from the maker and after completing it transfers it to a holder in due course. The appearance that the possessor is the obligee of the maker is the same as if the maker had voluntarily and intentionally delivered the incomplete writing to the possessor. But the facts upon which to impose responsibility for the appearance upon the maker are different. Here, the responsibility must depend upon the inscription or retention, or both, of the incomplete writing. In England, the incomplete writing in itself does not appear to obligate the maker. It has no more effect than an autograph on a blank sheet of paper. Is then the fact of the purposeless inscription and unguarded retention a basis for imposing responsibility on the maker for the appearance of obligation, the "ostensible ownership" of the possessor? That it is not, is the rule of English law.[16] The English rule was incorporated in § 15 of the Uniform Negotiable Instruments Law, and has become law in jurisdictions which have adopted that Act.[17] But in an American jurisdiction which has this year adopted the Uniform Negotiable Instruments Law,[18] in a recent case, *Phillips* v. *A. W. Joy Co.* (1916) 114 Me. 403, 96 Atl. 727, arising before its adoption, it was held that the signer was obligated. This decision, although at variance with the English rule and without American precedents, was a logical consequence of the American doctrine prevailing before the enactment of the Uniform Negotiable Instruments Law, that an incomplete writing is an "instrument" which even before completion appears to vest a power in the possessor to obligate the maker. Thus the conduct of the signer in creating and retaining such an "instrument" affords a basis which may reasonably be regarded as sufficient for the imposition of responsibility. In the American view the case is strictly analogous to one where a completed writing in the form of a bill or note has been stolen from the signer. It is interesting that fourteen years earlier the court which decided the principal case, had held the signer of a completed writing, stolen from him and transferred to a holder in due course, not obligated to the holder in due course.[19] The distinction attempted by the court, that in the principal case there was carelessness in the custody of the writing, and in the earlier case there was not, is a possible one. Although the inscription of a writing in the form of a complete or incomplete bill or note transferable by delivery may not be regarded as sufficient to make the signer responsible for the subsequent "ostensible ownership" of the thief, the unguarded retention of it may be.

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[15]Montague *v.* Perkins (1853) 22 L. J. C. P. 187; Bills of Exchange Act, 1882, § 20 (2).

[16]Baxendale *v.* Bennett (1878) 3 Q. B. D. 525; see Smith *v.* Prosser [1907] 2 K. B. 735; Hubbert *v.* Home Bank (1910) 20 Ont. L. R. 651; Ray *v.* Willson (1911) 19 Ont. Wkly. Rep. 470.

[17]Linick *v.* Nutting & Co. (1910) 140 App. Div. 265, 125 N. Y. Supp. 93; Holzman, Cohen & Co. *v.* Teague (1915) 172 App. Div. 911, 156 N. Y. Supp. 290; 16 Columbia Law Rev. 364.

[18]Maine, Laws of 1917, c. 257.

[19]Salley *v.* Terrill, *supra,* footnote 9.